IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 3928 OF 2000

1. M/s. Quuraishi & Co.)
2. Shri Khan Mohamed Hasmullah)
3. Shri Azhar Ali Khatir Ali)
4. Shri Barkhulla)
5. Shri Mohd. Shamim Khan Mohd.
Alleged Partners of Obst. No.1)
in respect of Suit Garage with)
Compound of Ebrahim Mansion,)
situated at 6m, Shepherd Road)
Bycullah, Mumbai 400008.) .. PETITIONERS
(Org. Obstructionists)

Versus

1. ALI KHAN HAROON KHAN)
2. Rajabali Gulzarali Sayed)
both residing on 4th Floor,)
Ebrahim Mansion, situate at)
6, Shephered Road, Byculla,)
MUMBAI 400008.) .. RESPONDENTS

Mr. Girish Desai with Ms. Geeta Shastri i/b M/s. Khilnani & Co. for petitioners

Ms. Shafaq h/f Mr. A.S. Uraizee for R-1 & 2.

CORAM:-SMT. RANJANA DESAI, J.

DATED:-26/8/2005

ORAL JUDGMENT:

. The petitioners are obstructionists 1 to 5 respectively. In this judgment they are referred to as obstructionists for convenience. R.A.E. Suit No. 666 of 1989 was filed by the respondents for possession of the suit premises on the ground of bonafide requirement against the defendants. Respondents plaintiffs are the owners of the suit premises. Admittedly suit was decreed on 12th June, 1997. The defendants carried an appeal which was dismissed. The defendants filed a writ petition which also came to be dismissed on 3rd April, 1980.

2. When the decree was put to execution the obstructionists obstructed. Obstructionist 1 took out Miscellaneous Notice No. 1001/99 in Obstructionist Notice No. 53/1998 praying that he may be allowed to carry out amendment. The said notice was discharged on 29/4/2000. The obstructionists then filed Revision Application No.

116 of 2000 in the Small Causes Court. The division bench of the Small Causes Court concurred with the trial court and held that the notice was rightly rejected. The revision was held not maintainable. The revision was thus disposed of. The obstructionists have challenged the said orders.

3. According to obstructionist 3 on 29/10/89, his evidence began and thereafter the matter was adjourned. He went to his village where he was staying with his uncle Mr. Usman Ali. There he was informed that the suit premises were taken on leave and licence basis by his father while he was working as a peon-cum-delivery clerk with M/s. Batlibhoy & Co., (p) Ltd. situated at Flora Fountain, Mumbai. He got some old papers lying in a trunk indicating that his father had entered into a leave and licence agreement dated 7/5/71 in respect of the suit premises with defendant Abdul Hafiz Khairullah Quraishi. According to obstructionist 2 his uncle had some other record to substantiate this contention. In view of this documentary evidence he took out notice praying that he may be allowed to carry out amendment to

his affidavit in reply.

4. The trial court has discharged the notice basically on the ground that obstructionist 3 wants to carry out this amendment in order to wriggle out of the admission made by him that he had come to the suit premises only in the year 1985 and that he had taken the suit premsies from the defendant who was the owner of the garage. The trial court was also of the view that the proposed amendment would change the nature of the defence.

5. I have heard at some length the learned counsel appearing for the parties.

6. The learned counsel for the petitioners/obstructionists contended that the executing court erred in holding that the proposed amendment was sought to be carried out so as to wriggle out of the admission made by obstructionist 3 in his evidence or that it is likely to change the entire nature of his defence. The learned counsel urged that whereas earlier obstructionist 3 has contended that he was the licensee of the defendant since 1985, by way of this amendment all that is sought to be contended is that he is a

protected tenant in view of the leave and licence agreement. He submitted that while considering amendment application the courts have to adopt a liberal approach. Amendments which prevent multiplicity of proceedings ought to be granted.

7. In support of his submissions the learned counsel relied on judgment of the Supreme Court in B.K.N. Pillai v. P. Pillai & Anr., AIR 2000 SC 614, Sampath Kumar v. Ayyakannu & Anr., AIR 2002 SC 3369, Raghu Tilak v. S. Rayappan & Ors., AIR 2001 SC 299 and judgment of this court in Mudra Salt & Chemical Industries v. Collector Thane & Ors., 2001 (3) M.L.J. 151.

8. On the other hand the learned counsel for the respondents contended that the courts below are right in holding that obstructionist 3 wants to change his defence and wants to wash out the effect of his admission. He submitted that no interference is necessary with the impugned orders.

9. In his evidence obstructionist 3 has clearly stated that he came to Mumbai in the year 1985 and that he had taken the suit premises on rent from defendant Hafiz Khairulla Qureshi. There is not a

whisper in the evidence about his father having entered into any leave and licence agreement. On the contrary he has stated that the premises were sublet to him by the defendant and at the time of executing the agreement he was given possession of the said premsies and the said agreement was executed by the defendant with him in the presence of witnesses. He has further gone on to say that the said agreement clearly provided that he was to pay Rs.300/- per month and give the deposit of Rs.30,000/- and that the said agreement of subletting to the knowledge of the plaintiff was and is valid and subsisting. When he has pleaded an agreement between him and the plaintiff by way of this amendment now he wants to contend that his father had entered into a leave and licence agreement dated 7/5/71 with the defendant. This is not an alternate plea. It is a plea which is repugnant to the plea earlier taken by him.

10. In my opinion, none of the judgments cited by the counsel for the obstructionists help them. In B.K.N. Pillai’s case the suit was for injunction seeking eviction of the defendant. The plaintiff’s case was that the defendant was a licensee. The defendant sought to amend his written statement to

incorporate the plea that in case he is not held a lessee, he was entitled to benefit of Section 60(b) of the Easements Act, 1882. It is against this background that the Supreme Court held that the plea is neither inconsistent nor repugnant to pleas already raised in defence; that the application cannot be rejected on the ground of delay when the plaintiff can be compensated by costs and that the proposed amendment would not amount to withdrawal of admission made by the defendant. Facts of the present case differ from these facts. Surely in this case it cannot be said that this amendment would not amount to withdrawal of admission made by the defendant. The present amendment seeks to introduce an inconsistent defence. In my opinion, the judgment in B.K.N. Pillai's case is not applicable to the case on hand.

11. In Sampath Kumar's case the suit was filed for permanent prohibitory injunction against dispossession. The case of the plaintiff was that the defendant had forcibly dispossessed him. The plaintiff made an application for amendment of the plaint seeking relief of declaration of title to suit property and consequential relief of delivery of possession. This was made before the

commencement of trial. The Supreme Court held that the amendment did not alter the basic structure of the suit. The Supreme Court was dealing with a pretrial amendment application whereas I am concerned with a case where amendment is sought to be made in affidavit filed in execution proceedings. The judgment in Sampat Kumar's case is, therefore, not applicable to the facts of this case.

12. In Ragu Thilak's case (supra) the suit was filed for permanent injunction restraining defendants from demolishing compound wall of suit property. It was the case of the plaintiff that during the pendency of the suit, the defendant demolished the compound wall. Plaintiff sought amendment to add relief of recovery of damages. It was urged that relief sought was barred by limitation. The Supreme Court held that the issue of limitation can be raised after allowing the amendment. This point does not arise in this case at all. Morever in that case the amendment was not likely to change the basic structure of the suit. Only subsequent events were sought to be added. The judgment in Raghu Tilak's case is not applicable to this case.

13. In Mudra Salt & Chemical Industries's case (supra) the suit was for declaration based on title. By amendment alternate plea based on adverse possession was sought to be incorporated in the plaint. This court held that alternate plea can always be incorporated in the plaint by amendment. This proposition can hardly be disputed. Alternate plea can be introduced but certainly not a plea which can be said to be repugnant to the plea already raised in the defence. A plea which tries to wash out the fact of the admission either by plaintiff or defendant can never be allowed to be introduced.

14. The learned counsel for the petitioner sought to rely on a judgment of this court in Appeal No. 465 of 2004 in Notice of Motion No. 993 of 2004 in Admiralty Suit No. 51 of 1998, in Sadhu Singh v. East Fleet Maritime Pvt. Ltd. & Ors. to contend that the executing court was wrong in observing that prejudice will be caused to the plaintiff because the amendment will change the nature of defence and the right which has accrued to the plaintiff would be lost. He submitted, relying on judgment in Sadhu Singh's case that additional

evidence can always be led. This judgment is not at all applicable to the present case because there the court was dealing with Order 18 Rule 4 of the Civil Procedure Code. This court did not examine when amendment should be granted.

15. In the facts and circumstances of the case, I am of the firm opinion that the present amendment is an attempt to frustrate the decree passed in 1997 in a suit of the year 1989. A liberal approach has to be adopted while considering amendment application so as to prevent multiplicity of proceedings but in cases where it is apparent that amendment is being introdocued to procrastinate the litigation with malafide intention, such amendment cannot be allowed.

16. Hence in my opinion, no interference is necessary with the impugned judgment and order. The petition is, therefore, dismissed. Rule is discharged.

17. Since the proceedings are pending, it is clarified that the executing court shall deal with the execution proceedings uninfluenced by any observations made by me in this judgment and

strictly on merits. In the circumstances of the case execution proceedings are expedited.

(SMT. RANJANA DESAI,J.)